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IN THE
Supreme Court of the United States
OCTOBER TERM, 1947

No.



74

ST. REGIS PAPER COMPANY,
Petitioner,

v.

THE UNITED STATES,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS**

✓ HORACE R. LAMB,
Attorney for Petitioner.

Dated: June 2, 1948.

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THE UNITED STATES, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

To: *The Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

Petitioner, St. Regis Paper Company, prays that a writ of certiorari issue herein to review the judgment of the Court of Claims sustaining the respondent's demurrer to petitioner's amended petition and dismissing the petition.

Opinion Below

The decision and opinion of the Court of Claims appears at R. 24, and is reported unofficially in 76 F. Supp. at page 831.

Jurisdiction

The judgment of the Court of Claims was entered April 5, 1948 (R. 30). The jurisdiction of this Court is invoked

under Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939, 28 U.S.C.A. Section 288(b).

Summary Statement of the Case

Petitioner, a New York corporation, sued in the Court of Claims for just compensation under the Fifth Amendment for the taking for a public use, for the period of 17 months from November 1, 1942 to April 1, 1944, of the temporary use of petitioner's pulp plant at Tacoma, Washington, and the petitioner's inventory and supply of pulpwood located at such plant and to be used as the essential raw material therein.

The petition alleges that the taking was the direct and intended effect of the War Production Board's General Preference Order M-251, the Schedule No. 1 thereto and seven specific directives thereunder issued to petitioner in October, 1942, pursuant to which petitioner's pulp plant was shut down for such 17 months period (R. 2-9).

The Board's order and the directives were issued pursuant to the provisions of the First War Powers Act of 1941 (Act of December 18, 1941, C. 593, 55 Stat. 838, 50 U.S.C.A. App. Sec. 601); the Second War Powers Act of 1942 (Act of March 27, 1942, C. 199, 56 Stat. 176, 50 U.S.C.A. App. Sec. 632) and the War and Defense Contract Acts (Act of June 28, 1940, C. 440, 54 Stat. 676, 50 U.S.C.A. App. Sec. 1152, subsection (a), subdivisions (1), (2) and (8)).

In these statutes, particularly the Second War Powers Act, 1942, Congress granted adequate power to the War Production Board as the "board authorized by the President" to acquire "any real property, temporary use thereof, or other interest therein, together with any per-

sonal property located thereon or used therewith, that shall be deemed necessary, for military, naval, or other war purposes * * *."

At the time of the issuance of the Board's order and directives, and for many years prior thereto, petitioner was engaged in the business of manufacturing and selling bleached and unbleached kraft pulp, paper and other paper products, and owned a large manufacturing plant in Tacoma, Washington, with machinery, apparatus and necessary facilities and equipment to manufacture from pulp specie logs approximately 300 tons per day of bleached and unbleached kraft pulp (R. 1, 2). In October, 1942 the plant was operating at capacity and petitioner had in inventory and under contract for delivery at its pulp plant a supply of pulpwood logs for continued operation at capacity production. The right to consume and process pulpwood is essential to the continued use and operation of petitioner's plant, and it is not adaptable to any use other than the manufacture of pulp, except that in a shutdown condition parts thereof are usable for storage purposes (R. 1 to 2).

The Board's General Preference Order No. M-251 (quoted in part in the petition below (R. 2-5) and printed at length *infra* at pp. 9-14) provided, among other things, that the Director General for Operations under such order could specifically direct petitioner, as a person holding a supply of pulpwood at its plant in the State of Washington (being in the designated area of shortage), to hold such supply "as a 'Reserve Supply', available for disposition by the Director General for Operations, from which the Director General for Operations may from time to time authorize or direct the delivery of specific quantities to specific persons and/or the manufacture of specific quan-

ties into specific products". The Director General could also "Direct that no person * * * may consume, process, deliver or accept any delivery of pulpwood * * * except upon specific authorization or direction by the Director General for Operations * * *." Further, he could limit or prohibit particular uses of pulpwood, among other things, "to insure the satisfaction of requirements, direct or indirect, for the defense of the United States * * *" and give such directions "in consideration of the possible dislocation of labor, the effect of the local shortage on the national supply of products manufactured from pulpwood and woodpulp, the problems of transporting such products into and out of the area defined, *and the necessity of keeping a plant in operation so that it may be able to fulfill war orders and essential requirements * * **" (Sec. 313.1(d) (2), (3) and (4)) (Italics supplied.)

It is the petitioner's contention, as alleged in the petition below, that General Preference Order M-251, Schedule No. 1 thereto and the specific directives issued to petitioner thereunder, in effect, constituted a requisitioning by the Government of the temporary use of petitioner's pulp mill and the complete control of petitioner's inventory and supply of pulpwood logs during the period November 1, 1942 to April 1, 1944.

The Schedule No. 1 (R. 10, Exhibit A to amended petition) and the specific directives issued to petitioner under M-251 allowed petitioner to consume from its inventory and supply of pulpwood sufficient pulpwood to operate its mill for the balance of the month of October and directed that for the period from November 1, 1942 to April 1, 1944 no pulpwood be consumed or processed in petitioner's mill R. 12 to 16, Exhibits B to H, inclusive, and R. 5, 6 and 7, paragraphs 8 to 10 and 13 of amended petition).

In addition, Schedule No. 1 declared the Puget Sound area (in which petitioner's plant is located) a critical area and contained provisions freezing pulpwood logs in the hands of holders in such area (R. 10 to 12). Furthermore, the specific directives issued to petitioner diverted to other manufacturers in the area pulpwood logs then held in petitioner's inventory (R. 14 to 16, Exhibits E, F, G and H to amended petition).

Petitioner protested the order and determination of the War Production Board and requested that it be permitted to continue in the manufacture of nitrating pulps or other pulps (R. 16, Exhibit I). Such protest was rejected, and in its letter of rejection to petitioner the Board's representative stated, in part (R. 22):

"We are confident that you realize that we regard the closing down of the Tacoma mill as a serious and regrettable action which we would not have taken had we seen any reasonable alternative. Under existing conditions, however, we must confirm our decision to deny authorization to your Tacoma mill to consume any pulpwood logs during November." (R. 6, 7, 22, amended petition, paragraphs 11, 12, and Exhibit J) (Italics supplied.)

The petition also shows that, as the direct, necessary and intended effect of the War Production Board's order and directives, petitioner's pulp plant at Tacoma was completely shut down during all of the period from November 1, 1942 to April 1, 1944 (R. 7, paragraph 13).

The petition further alleges that petitioner's right to consume and process pulpwood and to use and operate its plant during said period are property and property rights within the meaning of the Fifth Amendment, and that by reason of the War Production Board's action, as afore-

said, petitioner's property and rights were taken for a public use for which the respondent became obligated to make fair and reasonable compensation.

It is alleged, finally, that during the period November 1, 1942 to April 1, 1944 in the Puget Sound area there were no sales or leases of the temporary use of a pulp mill of the type and capacity of petitioner's pulp plant, or of the right to consume or process pulpwood therein; that petitioner sustained out-of-pocket shutdown expenses of \$376,754.86 (after crediting amounts received during the shutdown period as rent of storage space and other income), deterioration and depreciation in the amount of \$228,173.14 and lost profits of \$2,694,686.83, and that petitioner, therefore, claims the total of said amounts as the just compensation to which it is entitled (R. 8, 9).

Relevant Parts of Statutes Involved

Fifth Amendment to the Federal Constitution (last clause):

“* * * nor shall private property be taken for public use, without just compensation.”

Tucker Act (Judicial Code, Sec. 145, subdivision (1), Act of March 3, 1911, C. 231, Sec. 145, 36 Stat. 1136; Act of June 10, 1921, C. 18, Sec. 304, 42 Stat. 24):

“The Court of Claims shall have jurisdiction to hear and determine the following matters:

“(1) *Claims against United States.* First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an executive department, upon any contract, express or implied, with the Government of the United States, or for dam-

ages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: * * *"

First War Powers Act, 1941 (Act of December 18, 1941, C. 593, 55 Stat. 838; 50 U.S.C.A. App. Sec. 601):

"For the national security and defense, for the successful prosecution of the war, for the support and maintenance of the Army and Navy, for the better utilization of resources and industries, and for the more effective exercise and more efficient administration by the President of his powers as Commander in Chief of the Army and Navy, the President is hereby authorized to make such redistribution of functions among executive agencies as he may deem necessary, including any functions, duties, and powers hitherto by law conferred upon any executive department, commission, bureau, agency, governmental corporation, office, or officer, in such manner as in his judgment shall seem best fitted to carry out the purposes of this title, and to this end is authorized to make such regulations and to issue such orders as he may deem necessary, which regulations and orders shall be in writing and shall be published in accordance with the Federal Register Act of 1935 * * *."

Second War Powers Act, 1942 (Act of March 27, 1942, C. 199, 56 Stat. 176; 50 U.S.C.A. App. Sec. 632):

"The Act of July 2, 1917 (40 Stat. 241) entitled 'An Act to authorize condemnation proceedings of lands for military purposes', as amended, is hereby amended by adding at the end thereof the following section:

'Sec. 2. The Secretary of War, the Secretary of the Navy, or any other officer, board, commission, or governmental corporation authorized by the President, may acquire by purchase, donation, or other means of transfer, or may cause proceedings to be instituted in any court having jurisdiction of such proceedings, to acquire by condemnation, any real property, temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith, that shall be deemed necessary, for military, naval, or other war purposes, such proceedings to be in accordance with the Act of August 1, 1888 (25 Stat. 357), or any other applicable Federal statute, and may dispose of such property or interest therein by sale, lease, or otherwise, in accordance with section 1 (b) of the Act of July 2, 1940 (54 Stat. 712). Upon or after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used, and improved for the purposes of this Act, notwithstanding any other law. Property acquired by purchase, donation, or other means of transfer may be occupied, used, and improved, for the purposes of this section prior to the approval of title by the Attorney General as required by section 355 of the Revised Statutes, as amended.' "

War & Defense Contract Acts (Act of June 28, 1940, C. 440, 54 Stat. 676; 50 U.S.C.A. App. Sec. 1152, subdivision (a) (1)).

"Whenever deemed by the President of the United States to be in the best interests of the national defense during the national emergency declared by the President on September 8, 1939, to exist, the Secretary of the Navy is hereby authorized to negotiate contracts for the acquisition, con-

struction, repair, or alteration of complete naval vessels or aircraft, or any portion thereof, including plans, spare parts, and equipment therefor, that have been or may be authorized, and also for machine tools and other similar equipment, with or without advertising or competitive bidding upon determination that the price is fair and reasonable. Deliveries of material under all orders placed pursuant to the authority of this paragraph and all other naval contracts or orders and deliveries of material under all Army contracts or orders shall, in the discretion of the President, take priority over all deliveries for private account or for export:
 * * *

* * * *

“(2) Material entitled to priority in delivery
 * * * *

“Deliveries under any contract or order specified in this subsection (a) may be assigned priority over deliveries under any other contract or order; * * *
 * * * *

“(8) Exercise of powers by President

The President may exercise any power, authority, or discretion conferred on him by this subsection (a), through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe.”

General Preference Order M-251 (Fed. Reg. October 20, 1942, pp. 8424-8425, Document 42-10,519).

“The fulfillment of requirements for the defense of the United States has created in certain areas and is expected to create in other areas a shortage in the supply for defense, for export and for private account, of wood for pulp and lumber, and has

created a shortage in the supply for defense, for export and for private account of various materials and facilities required for the production of pulpwood; and the following order is deemed necessary and appropriate in the public interest and to promote national defense:

“§3113.1 *General Preference Order M-251*—(a) *Applicability of priorities regulations.* This order and all transactions affected thereby are subject to all applicable provisions of the priorities regulations of the War Production Board, as amended from time to time.

“(b) *Definitions.* For the purpose of this order:

“(1) ‘Person’ means any individual, partnership, association, business trust, corporation, governmental corporation or agency, or any organized group of persons, whether incorporated or not.

“(2) ‘Pulpwood’ includes wood of any species and in any form commonly delivered to a manufacturer of woodpulp for the manufacture of woodpulp, except those species and forms defined in and subject to the following orders of the War Production Board: M-186, M-228, M-229 and M-234.

“(3) A ‘holder of pulpwood’ is any person who holds or accumulates pulpwood for manufacture by himself into woodpulp.

“(4) To ‘hold’ or ‘accumulate’ pulpwood means to have or obtain control of a supply of pulpwood whether by production or purchase directly by the holder, by production or purchase by an affiliate or subsidiary or by one branch, division or section of a single enterprise or by production or purchase by any other person for delivery to or for the account of the holder.

“(c) *Reports of receipts, consumption and inventory of pulpwood.* Each producer of woodpulp

shall on or before the 5th day of each month (beginning with the 5th day of November, 1942) file with the Pulp and Paper Branch of the War Production Board, Reference M-251, for each mill operated by him located elsewhere in the United States than in the states of Washington and Oregon, Form PD-656, and for each mill operated by him located in the state of Washington or the state of Oregon, Form PD-661, showing the monthly receipts, consumption and inventory of pulpwood at and for such mill, according to the instructions accompanying such form.

“(d) *Control of pulpwood in areas of shortage.* Whenever the Director General for Operations determines that there prevails in any area a shortage in the supply of any type or types of pulpwood required for the production of materials needed in the public interest and for national defense, he may issue a schedule defining such area and such type or types of pulpwood, and may thereupon, according to the degree of the shortage and the immediacy of the need, and as specified in such schedule,

“(1) Allocate specific quantities of pulpwood of the type or types defined held or accumulated in such area from and to specific persons;

“(2) Direct holders of pulpwood in such area to maintain in their holdings or accumulations of pulpwood of the type or types defined a stated quantity or percentage, either uniform for all such holders or particular for any, to be known as a ‘Reserve Supply’, available for disposition by the Director General for Operations, from which the Director General for Operations may from time to time authorize or direct the delivery of specific quantities to specific persons and/or the manufacture of specific quantities into the specific products, and the Director General for Operations may in addition

from time to time allocate specific quantities of any pulpwood of the type or types defined held or accumulated in such area, although not a part of such 'Reserve Supply', from and to specific persons; and provide procedures for applying for and granting such authorizations, directions and allocations;

"(3) Direct that no person, or no person of a specified class, may consume, process, deliver or accept delivery of any pulpwood of the type or types defined held or accumulated in such area except upon specific authorization or direction by the Director General for Operations, and provide procedures for applying for and granting such authorization or direction; and/or

"(4) Limit or prohibit particular uses of pulpwood of the type or types defined held or accumulated in such area. In any allocation, authorization or direction issued by the Director General for Operations pursuant to clause (1), (2) or (3) of the foregoing paragraph, the Director General for Operations may require the person to whom such allocation, authorization or direction is issued to manufacture, from the pulpwood which is the subject thereof, particular types and quantities of woodpulp or other wood product or impose upon the use of such pulpwood by such person any other conditions necessary and appropriate in the public interest and for national defense. Such allocations, authorizations and directions and any conditions attached thereto, and any limitations or prohibitions issued pursuant to clause (4) of the foregoing paragraph, shall be made to insure the satisfaction of requirements, direct and indirect, for the defense of the United States and for essential civilian supply, may be made in consideration of the possible dislocation of labor, the effect of the local shortage on the national supply of products manufactured from pulpwood

and woodpulp, the problems of transporting such products into and out of the area defined, and the necessity of keeping a plant in operation so that it may be able to fulfill war orders and essential requirements, and may be made in the discretion of the Director General for Operations, without regard to preference ratings.

“(e) *Miscellaneous provisions*—(1) *Records*. All persons affected by this order shall keep and preserve, for not less than 2 years, complete records concerning their receipts, inventories, and consumption or other disposition of pulpwood.

“(2) *Audit and inspection*. All records required to be kept by this order shall, upon request, be submitted to audit and inspection by duly authorized representatives of the War Production Board.

“(3) *Reports*. All persons affected by this order shall execute and file with the War Production Board such reports and questionnaires as said Board shall from time to time request.

“(4) *Violations*. Any person who wilfully violates any provision of this order, or who, in connection with this order, wilfully conceals a material fact or furnishes false information to any department or agency of the United States, is guilty of a crime, and upon conviction may be punished by fine or imprisonment. In addition, any such person may be prohibited from making or obtaining further deliveries of or from processing or using material under priority control and may be deprived of priorities assistance.

“(5) *Communications*. All reports required to be filed hereunder and all communications concerning this order shall, unless otherwise directed, be addressed to: Pulp and Paper Branch, War Production Board, Washington, D. C., Ref.: M-251.

(P.D. Reg. 1, as amended, 6 F.R. 6680; W.P.B. Reg. 1, 7 F.R. 561; E.O. 9024, 7 F.R. 329; E.O. 9040, 7 F.R. 527; E.O. 9125, 7 F.R. 2719; sec. 2(a), Pub. Law 671, 76th Cong., as amended by Pub. Laws 89 and 507, 77th Cong.)

“Issued this 19th day of October 1942.

ERNEST KANZLER,

Director General for Operations.

[F. R. Doc. 42-10519; Filed, October 19, 1942; 11:37 a.m.]”

Schedule No. 1 to General Preference Order M-251 and the specific directives to petitioner are set forth in the amended petition (paragraphs 7 *et seq.* and Exhibits A, B, C, D, E, F, G and H thereto).

Questions Presented

The ultimate question is whether the allegations of the amended petition are sufficient to state a claim for just compensation for the taking of petitioner's private property for a public use within the meaning of the Fifth Amendment to the Constitution. More specifically, the question is whether, under the circumstances alleged in the amended petition, the effect of General Preference Order M-251 and the specific directives of the War Production Board to the petitioner constituted a requisition of the temporary use of petitioner's pulp-mill and inventory of pulpwood logs.

Specification of Error to be Urged

The Court of Claims erred:

(1) In holding that there was no exercise by the government of proprietary rights over petitioner's private prop-

erty. The opinion shows a failure on the part of the Court to consider the following:

(a) The statutory power conferred upon the War Production Board (as a "board" authorized by the president) by the Second War Powers Act to acquire for war purposes "the temporary use" of any real property "or other interest therein, together with any personal property located thereon or used therewith". In the opinion of the Court there is no mention of this statutory power.

-(b) The purpose and provisions, as well as the scope and effect, of the Board's General Preference Order M-251, Schedule No. 1 thereto and the specific directives issued to petitioner thereunder. The provisions of the order and directives are not discussed in any detail in the opinion. Their effect was not limited, as stated in the Court's opinion (R. 24), to the "freezing" of the sources from which petitioner could procure pulpwood from November 1, 1942 to April 1, 1944. The petition makes no reference whatsoever to any source of supply of pulpwood or to the interference with any such source by reason of the Board's order and directives. The petition does allege, however, that on October 23, 1942, petitioner "had in inventory at said pulp plant and under contract for delivery to the pulp plant a supply of pulpwood logs for the continued operation of said pulp plant at capacity production" (R. 2).

(c) The dominion and control which the War Production Board acquired over petitioner's inventory and supply of essential raw material, pulpwood.

The Court of Claims erroneously suggests that the order and directives of the Board permitted petitioner to consume logs on hand in some kind of manufacture other than

that in which it was then (October 1942) engaged. In the court's opinion, it was said (R. 24):

“Plaintiff had some logs on hand, but it was not permitted to consume these in the kind of manufacturing in which it was then engaged.”

The court overlooked the alleged fact that the order and directives of the War Production Board did not permit the petitioner to consume *any* logs or to engage in *any* type of manufacture in its Tacoma mill.

(d) The direct and intended effect of such control upon the use of petitioner's plant and facilities in the processing of pulpwood into pulp, which was the only use (other than as storage space) to which petitioner's property could be put. The Board's letter to the petitioner states “we regard the closing down of the Tacoma mill as a serious and regrettable action *which we would not have taken had we seen any reasonable alternative*” (R. 22) (*Italics supplied*). The purpose and effect of the Board's action was to deprive petitioner of the temporary use of its mill and its entire inventory of logs so that its skilled employees and essential raw material would thereupon become available for use by other mills designated by the Board; and the petition so alleges (R. 7-8).

(2) In holding that the allegations of the petition are insufficient “under the limitations set out and defined in the decisions of the Supreme Court, this court [*i.e.*, the Court of Claims] and other courts of the country to establish such a taking” of private property for a public purpose (R. 25).

The decisions cited in the opinion of the Court of Claims do not, we respectfully submit, contain any “limitations” which appear to preclude petitioner's claim. The

recent decisions of this Court, such as *United States v. Causby*, 328 U. S. 256; *United States v. General Motors Corporation*, 323 U. S. 373, and the earlier decisions upon which those decisions rested, are not discussed in the opinion of the Court of Claims. The principal decisions upon which that court relied are cases of frustration of contract, such as *Omnia Commercial Co. v. United States*, 261 U. S. 502, and *Morrisdale Coal Co. v. United States*, 55 C. Cls. 310, affd. 259 U. S. 188, none of which have any application here.

More important, however, it is impossible, we believe, to reconcile the holding below with the decision of this Court in *International Paper Company v. United States*, 282 U. S. 399. In that case the International Paper Company's right to the use of water power, which was essential to the continued operation of its paper mill at Niagara Falls, New York, was diverted by government order to a privately owned and operated hydro-electric power company to enable the power company to increase its output and furnish additional electric power to manufacturers, other than the Paper Company, having plants at Niagara Falls and designated by the War Department, for use by such other manufacturers in the manufacture of products needed for national defense in World War I. The effect of the diversion of the water power was to cause the International Company's paper mill at Niagara Falls to be shut down.

The International Company claimed compensation in the total amount of \$590,732.20, of which \$304,685.36 represented the out-of-pocket or direct overhead expenses on account of the shutdown, and the balance of approximately \$289,000 represented loss of profits which would have been earned if the mill had operated during the shut-

down period. The International Company urged, among other things:

“* * * In depriving the claimant of its [water] rights, the United States took something more than the water rights *in vacuo*; it caused the mill to shut down completely, resulting in unavoidable expense and prevented the realization of the profits which the claimant would otherwise have enjoyed. For this the claimant is entitled to be reimbursed.” (Claimant’s Request for Special Findings of Fact and Brief, Court of Claims, at page 282)

After trial, and upon special findings of fact, the Court of Claims determined, as a conclusion of law, that the International Company was not entitled to recover compensation and dismissed the petition. The dismissal was upon the theory that the diversion of the water was, at most, a frustration of a contract right for which there was no compensation, citing *Omnia Commercial Co. v. United States*, *supra*, 261 U. S. 502.

This Court (opinion by Holmes, J.) reversed the judgment of the Court of Claims dismissing the petition and held that the Paper Company was entitled to compensation of \$304,685.36 as the Paper Company’s out-of-pocket and overhead shutdown expense during the period while the Government’s directive forced the closing of the paper mill.

In the Court’s opinion, rejecting the argument of the Government that there was no taking, it was said (at page 407):

“* * * It is true that petitioner did not come within the scope of the Government’s written promise [to the Power Company] to pay. But the Government purported to be using its power of

eminent domain to acquire rights that did not belong to it and for which it was bound by the Constitution to pay. It promised to pay for all the power that the canal could generate. If it failed to realize that the petitioner had a right to a part of the power, its clear general purpose and undertaking was to pay for the rights that it took when it took the power (citing cases). Of course it does not matter that by a subordinate arrangement it directed the use of the power to companies that would fulfil its purposes rather than to machinery of its own. That arrangement it was able to make only because it took the power. * * *

"We perceive no difficulty arising from the case of *Omnia Commercial Co. v. United States*, 261 U. S. 502. There the taking of the whole product of a company went no further than to make it practically impossible for that company to keep a collateral contract to deliver a certain amount of steel to the appellant. But here the Government took the property that the petitioner owned as fully as the Power Company owned the residue of the water power in the canal. Our conclusion upon the whole matter is that the Government intended to take and did take the use of all the water power in the canal; that it relied upon and exercised its power of eminent domain to that end; that, purporting to act under that power and no other, it promised to pay the owners of that power, and that it did not make the taking any less a taking for public use by its logically subsequent direction that the power should be delivered to private companies for work deemed more useful than the manufacture of paper for the exigencies of the national security and defence.
* * *

It appears that the International Company's proof of loss of profits as a result of the shutdown of the paper

mill was not considered satisfactory and, upon the appeal, that element of the claim for compensation was abandoned. It is significant, however, that in sustaining the claim for compensation neither the claimant nor this Court attempted to measure the compensation by the value of the water power, as such. This Court accepted the claimant's view that the taking of the water rights caused the mill to shut down completely, and that the shutdown resulted in unavoidable expense to the claimant for which the claimant was entitled to reimbursement. In the course of the opinion of the Court it was expressly stated (282 U. S. 399, at page 406):

“* * * On February 7, 1918 its [petitioner's] use of the water ceased and was not resumed until midnight November 30, 1918, when the order of December 28 [diverting petitioner's water for power purposes] was abrogated. The Court of Claims found that the shutting off of the water from the petitioner's mill cost it \$304,685.36, direct overhead expense, but gave judgment that the petition be dismissed.”

In reversing the judgment of the Court of Claims, therefore, this Court upheld the right to compensation for the deprivation of the use of the paper mill which was the direct and necessary result of the taking of the International Paper Company's water power right.

In the instant case the Government's directives to this petitioner to maintain its holdings of pulp as a “‘Reserve Supply’ available for disposition by the War Production Board,” and the actual diversion of portions of petitioner's inventory of logs to other manufacturers, deprived this petitioner of the temporary use of its pulp plant as effectively and completely as did the War Department's

directive in the *International Paper Company* case, which, for a temporary period, diverted the Paper Company's water power to a privately owned and operated power company. The fair compensation for the deprivation of petitioner's private property may be measured here, as it was in the *International Paper Company* case, by the out-of-pocket shutdown expenses of the petitioner's pulp mill and the provable lost profits of this petitioner.

We respectfully submit, therefore, that the decision of this Court in *International Paper Company v. United States*, *supra*, is a controlling precedent and that the decision of the Court of Claims in the instant case, dismissing the petition, is in conflict therewith.

The Court of Claims has relied primarily on prior decisions of the Court of Claims (*Royal Holland Lloyd v. United States*, 73 C. Cls. 772 and *Morrisdale Coal Co. v. United States*, *supra*, 55 C. Cls. 310, *affd.* 259 U. S. 188), all of which appear to be clearly distinguishable. Moreover, the Court of Claims has not applied the proper legal tests for determining whether private property has been taken by the Government for a public purpose, as stated by this Court in a number of prior decisions, including, among others, *United States v. Causby*, *supra*, 328 U. S. 256; *United States v. General Motors Corporation*, *supra*, 323 U. S. 373.

In *United States v. Causby*, *supra*, this Court said:

“* * * It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken. *United States v. Miller*, 317 U. S. 369. Market value fairly determined is the normal measure of the recovery. *Id.* And that value may reflect the use to which the land could readily be converted, as well as the existing use. *United*

States v. Powelson, 319 U. S. 266, 275, and cases cited. If, by reason of the frequency and altitude of the flights [of government airplanes over respondent's chicken farm lands], respondents could not use this land for any purpose, their loss would be complete. It would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it."

The opinion goes on to point out that an easement, either temporary or permanent, might be taken by flights of Government airplanes over respondent's farm land, saying (at page 262):

"* * * It would be a definite exercise of complete dominion and control over the surface of the land. The fact that the planes never touched the surface would be as irrelevant as the absence in this day of the feudal livery of seisin on the transfer of real estate. The owner's right to possess and exploit the land—that is to say, his beneficial ownership of it—would be destroyed. It would not be a case of incidental damages arising from a legalized nuisance * * * the land is appropriated as directly and completely as if it were used for the runways themselves. * * * enjoyment and use of the land are not completely destroyed. But that does not seem to us to be controlling. The path of glide for airplanes might reduce a valuable factory site to grazing land, an orchard to a vegetable patch, a residential section to a wheat field. Some value would remain. But the use of airspace immediately above the land would limit the utility of the land and cause a diminution in its value. * * *"

The opinion also recognized that the air space above the chicken farm of respondent, Causby, was a public highway and that respondent owned as much of the space

above the ground as he could use in connection with the land, and said further (at page 264):

“* * * The fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material. As we have said, the flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it. * * * The reason is that there would be an intrusion so immediate and direct as to subtract from the owner’s full enjoyment of the property and to limit his exploitation of it. * * *”

This Court adopted the philosophy of *Portsmouth Harbor Land & Hotel Company v. United States*, 260 U. S. 327, saying (at page 265):

“In this case, as in *Portsmouth Company v. United States*, *supra*, the damages were not merely consequential. They were the product of a direct invasion of respondents’ domain. As stated in *United States v. Cress*, 243 U. S. 316, 328, ‘* * * it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking.’”

We respectfully submit that, by parity reasoning, the Court is warranted in holding that the character of the Government’s intrusion or invasion of petitioner’s right to the use of its pulp mill during the period from November 1, 1942 to April 1, 1944 was such that there was a taking of petitioner’s private property for a public purpose which is compensatory under the Fifth Amendment.

In the *Causby* case it was also noted (page 261, footnote 6) “That destruction of all uses of the property” has been held to constitute a taking of private property, citing

Pumpelly v. Green Bay Company, 13 Wall. 166; *United States v. Lynah*, 188 U. S. 445; *United States v. Welch*, 217 U. S. 333.

(3) In holding that there was no taking of private property because the pulp mill in a shutdown condition "was left in the hands of the plaintiff".

This holding, we respectfully submit, is in conflict with the long established rule that it is the private owner's loss, not the taker's gain, which is to be compensated (*United States v. Causby, supra*; *United States v. Powellson*, 319 U. S. 266, 281 and cases cited) and that "Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking" (*United States v. General Motors Corporation, supra*, 323 U. S. 373, 378 and cases cited).

It cannot be doubted that as between private parties, for example, petitioner and a competitor, the acquisition by the competitor of the temporary use of petitioner's plant in order to shut it down so that the competitor's plants in the same area may continue in operation at full capacity in the manufacture of defense goods, and for that purpose have the right to take over petitioner's skilled employees and to consume petitioner's inventory and supply of essential raw material, would clearly be regarded as the acquisition of private property rights by the petitioner's competitor who would thereby become legally bound to pay petitioner fair compensation therefor. In effect, the order and directives of the War Production Board to petitioner constituted an acquisition by the Government of precisely the same private property rights which, in the supposed case, would have been acquired by

petitioner's competitor. The acquisition by the Government was for a public purpose, namely, the defense of the United States. The petition shows that the taking of petitioner's private property was intentional and that petitioner suffered substantial damages. On the facts alleged in the petition, therefore, we respectfully submit that a valid claim for compensation for the taking of private property for a public use has been sufficiently stated.

The recent case of *United States v. Dickinson*, 331 U. S. 745, decided June 16, 1947, was a suit under the Tucker Act to recover judgments for the value of easements taken by flooding land, for damages by erosion to parts of land and for an easement for intermittent flooding of parts of land. The Government objected that the claims were outlawed by the statute of limitations. This Court sustained a judgment allowing the claims and overruling the Government's objections, saying, among other things (at page 748):

"Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time. The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding 'causes of action'—when they are born, whether they proliferate and when they die. * * *

It is respectfully submitted that the "inroads" made by the Government upon petitioner's use of its pulp mill in the instant case constituted a "taking" in the constitutional sense.

(4) In holding that the petition "does not purport to so charge that it was the [War Production] Board's objective to shut down plaintiff's plant. * * * Its [the Board's] rejection of plaintiff's request to be permitted to convert [its mill] to the manufacture of nitrating pulp was directed neither toward the gaining of any control of plaintiff's plant nor toward the destruction of its ability to operate profitably, though it may have been aware that this latter would follow as a necessary consequence of its action." (R. 29, 30)

We respectfully submit that upon a fair reading of the petition as a whole it is clearly alleged that it was the purpose and intention of the Board to secure dominion and control over petitioner's pulpwood inventory as a "Reserve Supply" available for disposition by the War Production Board and to shut down petitioner's plant for the defense of the United States. The petition shows that in rejecting petitioner's protest the War Production Board admitted in writing to petitioner: "we regard the closing down of the Tacoma mill as a serious and regrettable action which we would not have taken had we seen any reasonable alternative." (R. 22). Adequate evidence of an intention of the Board to take petitioner's private property is further found in the specific directives to petitioner (R. 12 to 20, Exhibits B, C, D, E, F, G, H, I, and J annexed to the amended petition). The directives also show that the purpose of the War Production Board was to require petitioner's plant to be shut down so that the manufacture of nitrating and other pulps in the Puget Sound area could be concentrated in other plants designated by the Board. Thus, the allegations of the petition plainly negative the holding of the Court of Claims.

In passing upon the sufficiency of the allegations of the amended petition here and considering the legal effect of the drastic character of the order and directives of the War Production Board to this petitioner, we respectfully suggest that the allegations are to be weighed in relation to the purposes to be served by the Fifth Amendment and by having in mind the conditions under which modern total warfare is carried on. It is common knowledge that modern war involves a far greater use by the Government for public purposes than ever before of privately-owned manufacturing facilities. In considering this petition for a writ of certiorari, therefore, we believe it proper to invoke the doctrine stated by an eminent Justice of this Court that "Constitutions are intended to preserve practical and substantial rights, not to maintain theories" (Opinion of Holmes, J., in *Davis v. Mills*, 194 U. S. 451, 457, and recently cited in *United States v. Dickinson*, *supra*, 331 U. S. 745, at page 748).

(5) That the shutdown out-of-pocket expense and the loss of profits during the shutdown period was an incidental consequence of the respondent's acts for which there is no liability.

This holding appears to be in direct conflict with the views expressed by this Court that damages are direct and not merely consequential where the "intrusion" by the Government in the property rights of a private owner is "so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it." (*United States v. Causby*, *supra*, page 265.) Here, as in *International Paper Company v. United States*, *supra*, the shutdown expense and the provable loss of profits are claimed as the measure of the fair value of

the property taken. No claim is made here for the taking of a business separate and apart from the special value of the temporary use of the petitioner's pulp plant and log inventory. Shutdown out-of-pocket expenses and loss of profits (if capable of proof) are proper elements in determining the just compensation for the taking of a privately owned mill property for a public use in a similar situation (*International Paper Company v. United States, supra*).

Reasons for the Petition

The writ of certiorari prayed for should be allowed for the following reasons:

(1) In sustaining the demurrer to the petition the Court of Claims has decided an issue in the instant case which is of great public importance. So far as we know, there has been no decision by this Court construing the broad powers granted by Congress under the provisions of the Second War Powers Act, 1942 which were invoked by the War Production Board in the situation alleged in the petition. Moreover, so far as we know, this Court has not previously had occasion to consider the effect of an order of the War Production Board of the character shown here.

Published records now available plainly indicate that the authorized representatives of the Government who were responsible for the issuance of General Preference Order M-251 and the specific directives thereunder entertained the view that the shutdown of petitioner's pulp mill would give rise to a claim for compensation.

The former General Counsel and Assistant General Counsel of the War Production Board have published

their views that the "M" series of orders of the Board were of such a drastic character in controlling the use of private properties and materials that they could have the effect of putting private companies out of business and present questions of the taking of private property for public use under the Fifth Amendment of the Constitution (see "The War Production Board Administrative Policies and Procedures" by John Lord O'Brian and Manly Fleischmann, 13 George Washington Law Review, December, 1944, No. 1, at page 29). It appears to have been the theory of the Board that private property would not be taken if the Board's order did not prohibit manufacture entirely and the use of a substitute material was permitted. In the instant case it clearly appears from the allegations of the petition that *all manufacture* at the petitioner's plant was prohibited and that *no substitute material* could be used. The instant case, therefore, presents the important question whether the actual application of the Board's order and its specific directives to the petitioner did not, in effect, accomplish the acquisition or requisition by the Government for war purposes of the temporary use of the petitioner's mill property and the personal property thereon and used therewith, as was permitted by the express provisions of the Second War Powers Act, 1942.

A public record prepared under the supervision of James W. Fesler, War Production Board Historian, entitled "Historical Reports on War Administration, War Production Board, Special Study No. 7, Pulp and Paper Policies of the War Production Board and Predecessor Agencies, May 1940 to January 1944", pages 61 to 68, shows that the Government action which resulted in the shutdown of petitioner's mill was initiated by the United

States War Manpower Commission at the instance of the War and Navy Departments as a war measure; that these Departments, by their spokesman, recommended for the pulp and paper industry "a policy of concentration in Washington and Oregon" in order that needed highly skilled employees might be made available; that in adopting such a policy the Director of the Office of Civilian Supply and Chairman of the Committee on Concentration of Production recognized that such a plan of necessity entailed "a scheme of compensation for the concentrated mills" (page 64). That public record further shows (at page 65) that three mills, including petitioner's, were proposed to be closed down; that petitioner's was the second largest scheduled for shutdown; that representatives of the largest mill strenuously objected to a shutdown on the ground that "it would face bankruptcy by the closing down", and that the program was revised to permit that mill to operate at 50% of capacity. Thus, the public record shows that the petitioner's mill was the largest mill shut down pursuant to General Preference Order M-251 and that 365 of petitioner's skilled employees were thereby released (page 65).

With regard to the "compensation" which the concentration program involved, it is further to be noted that in rejecting a suggestion of making the pulp mill shutdown program a "two bite" instead of a "one bite" program, the Historical Report states the following (at page 66):

"* * * the WPB concentration officials pointed out that since the concentration program involved compensation a 'two bite' program would be too difficult to handle. The 'one bite' program was because of U. S. insistence, agreed upon, and Gen-

eral Preference Order M-251 was issued by the Director General for Operations on October 26, making possible control of pulpwood in the shortage areas. * * *

Thus, the official historical record of the Government's acts which are the subject of the claim for compensation in the instant case establish beyond doubt that at the very time of the issuance of General Preference Order M-251 the Government officials responsible therefor recognized that the program would involve the obligation of the Government to make compensation to the mills affected by the shutdown order.

Admittedly, it would have been proper for the Government officials to have issued a requisition order expressly taking over the "temporary use" of the petitioner's pulp plant at an agreed "compensation", or pursuant to a procedure for the determination of the fair compensation at the time of the "taking". That, however, was not done and the important issues of "taking" of petitioner's private property for a public use and of the "fair compensation" payable therefor are now before the courts in the instant case for determination, as was apparently anticipated by the Government officials in charge of the matter in October 1942.

We respectfully submit, therefore, that this Court should allow the important question of law which the case presents to be reviewed on certiorari.

(2) The Court of Claims decided the important federal question under the Fifth Amendment to the federal Constitution in a way which conflicts with the decision of this Court in *International Paper Company v. United States*, *supra*.

(3) The Court of Claims decided the federal question involved here in a way directly in conflict with other applicable decisions of this Court, including (in addition to *International Paper Company v. United States, supra*), *United States v. General Motors Corp., supra*, *United States v. Causby, supra*, *United States v. Dickinson*, 331 U. S. 745, and cases cited therein.

Conclusion

The questions now presented are of real importance and the opinion and decision below appear to be in conflict with the decision of this Court in *International Paper Company v. United States, supra*. Accordingly, the petition for the writ of certiorari should be granted.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue to the United States Court of Claims and submits herewith a certified transcript of the record in the Court below in support of this petition.

Respectfully submitted,

ST. REGIS PAPER COMPANY,

By HORACE R. LAMB,
Attorney for Petitioner.

Dated: June 2, 1948.